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William N. Lobel

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# THE LEGALITY OF THE UNITED STATES' INVOLVEMENT IN VIETNAM—A PRAGMATIC APPROACH

WILLIAM N. LOBEL\*

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## I. INTRODUCTION

An analysis of the legality of the United States' role in the Vietnam conflict ultimately polarizes into two separate aspects: (1) the constitutionality of the President's actions with regard to Vietnam,<sup>1</sup> and (2) the validity of our intervention in the conflict under international law.<sup>2</sup> While these two aspects of the problem are in some ways interdependent,<sup>3</sup> "[t]he international and constitutional consequences of the exercise of the foreign relations power are not identical."<sup>4</sup> This difference in consequences is especially significant in view of the challenges which have been issued against the legality of the "war."

The judiciary has been flooded with cases wherein litigants have sought to avoid being forced to serve in the armed forces in Vietnam. These petitioners have typically alleged both that the United States involvement in the conflict is unconstitutional and that it is in viola-

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1. See generally Moore and Underwood, *The Lawfulness of United States Assistance to the Republic of Vietnam*, 112 CONG. REC. 15519 (1966) (constitutional); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

2. See generally Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L L. 750 (1966); Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122 (1966).

3. See pp. 798-99 *infra*.

4. Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1092 (1967); see *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888).

tion of international law.<sup>5</sup> To date, the courts have uniformly refused to hear these cases, stating that the petitioners lack proper standing to raise the issue of the legality of the "war," and further that the issues involved are inherently non-justiciable.<sup>6</sup>

Should the courts determine to hear these issues, the petitioner may find that while a determination that the "war" is unconstitutional will justify his refusal to serve in the conflict, a showing that the United States action is violative of international law will not achieve this result. Ample precedent has been established for the proposition that the domestic validity of a Presidential or Congressional action is not affected by the fact that such action is violative of international law.<sup>7</sup>

The argument has been made that the adoption of the Treaty of London<sup>8</sup> and the Charter of the International Tribunal at Nuremberg,<sup>9</sup> making it a crime to participate in an illegal war, should justify a refusal to serve in a war which is violative of international law. This position has never been seriously considered by any tribunal other than Nuremberg, and upon close analysis the rationale does not appear sound. The practical effect of any judicial precedent even impliedly authorizing the criminal prosecution of every member of the armed forces of a nation guilty of violating international law would be tremendous. Certainly no domestic court would accept this rationale and then proceed to declare the "war" illegal—thereby "branding" every member of its armed forces an international criminal subject to prosecution.

While the international status of our involvement in Vietnam does not affect the domestic rights of our citizens, it is very important in terms of the position occupied by the United States in the world community of nations. A complete analysis of our role in Vietnam must, therefore, treat both the constitutional and the international aspects of the situation.

## II. THE LEGAL STATUS OF THE VIETNAM CONFLICT—WHAT IS A WAR?

The challenges against the constitutionality of the United States' role in Vietnam are all based upon the assumption that the conflict is a "war" within the meaning of Article 1 Section 8 of the Constitution.<sup>10</sup>

5. See, e.g., *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 945 (1967); *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

6. *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1966). But see *Mora v. McNamara*, 389 U.S. 934, 937 (1967) (Douglas, J., dissenting), *denying cert. to Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967).

7. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888).

8. 59 Stat. 1546 (1945).

9. 6 F.R.D. 69 (1946).

10. See cases cited note 5 *supra*, alleging that the President is conducting a "war" without a declaration of war from Congress.

If our activities in Vietnam do not constitute engaging in a "war," there can be no doubt the the Executive's actions are constitutional. It thus becomes important to determine the meaning of a "war" in the constitutional sense.

Courts have tended to attach a broad meaning to the term "war." In the *Prize Cases*,<sup>11</sup> for example, the Supreme Court held that a state of war exists whenever a nation prosecutes its rights by force. It is unlikely, however, that the Court would adopt so broad a definition if it were squarely faced with the issue of whether the Vietnam conflict is a war.

Military tribunals have adopted a far more restricted definition of the existence of war in cases arising under the Military Code of Justice.<sup>12</sup> Here the emphasis is placed upon the number of troops involved, the financial expenditures required, and other similar factors.

When these criteria are applied to Vietnam, it is clear that the conflict qualifies as a war. At present, approximately 600,000 combat troops and more than 50% of the nation's entire airpower is committed to military activities in Vietnam.<sup>13</sup> In addition, over 25,000 Americans have been killed and more than 100,000 wounded, and more bomb tonnage has been dropped than was dropped on America's European enemies in World War II.<sup>14</sup> These facts have led one military tribunal to conclude that the Vietnam conflict is in fact a "war."<sup>15</sup>

It would also appear that the United States government has categorized Vietnam as a war zone. The Republic of Vietnam Campaign Medal, which is awarded to members of the armed forces of the Republic of Vietnam only in war time, has recently been authorized to be awarded to American servicemen in Vietnam.<sup>16</sup>

The fact that a formal declaration of war has never been issued will not affect the legal status of the conflict. The Supreme Court has consistently held that if all other factors of a war exist, the fact that no formal declaration of war has been issued is irrelevant.<sup>17</sup>

It therefore appears obvious that the Vietnam conflict is in fact a "war" within the meaning of Article 1 Section 8. The following analysis of the constitutional and international status of our involvement in the conflict proceeds upon this premise.

11. 67 U.S. (2 Black) 635 (1863).

12. See *United States v. Bancroft*, 3 U.S.C.M.A. 3,5, 11 C.M.R. 3,5 (1953):

We believe a finding that this is a time of war . . . is compelled by the very nature of the conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on, the battlefields . . . ; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service . . . ; and the tremendous sums being expended . . . .

13. 114 CONG. REC. 6490 (1968) (remarks of Senator Young).

14. Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449, 452, 454 (1968).

15. *United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968).

16. 32 C.F.R. § 47.1-5 (1968).

17. *E.g.*, *Bas v. Tingy*, 4 U.S. (4 Dall.) 36, 39-40 (1800); *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871); *Mastersen v. Howard*, 85 U.S. (18 Wall.) 99, 105 (1873).

### III. THE CONSTITUTIONAL BASIS FOR OUR INVOLVEMENT

#### A. *Unilateral Presidential Action*

##### 1. CONSTITUTIONAL PROVISIONS—ARTICLE 1 SECTION 8 VERSUS ARTICLE 2 SECTION 2

The interpretation of constitutional provisions requires an analysis of their origin as well as the "line of their growth."<sup>18</sup> When viewed in terms of their origin, the meaning of both Article 1 Section 8 and Article 2 Section 2 is clear.

The Constitution was written with the desire to avoid many of the evils of the monarchies of Europe. The framers considered the tendency of monarchs to unilaterally involve their people in wars which were not really in the best interest of the people to be "the most oppressive of all Kingly oppressions."<sup>19</sup> To eliminate this evil, the drafters specifically vested the power to declare war in the body most representative of the people—Congress.<sup>20</sup>

Article 2 Section 2 of the Constitution provides that the "President shall be Commander-in-Chief of the Army and Navy. . . ." When viewed in the context of the environment in which it was framed, it would be unreasonable to interpret this clause as granting to the Executive uncontrolled power to deploy the armed forces of the United States.<sup>21</sup>

Evidence exists that the states in ratifying the Constitution understood that the provisions of Article 2 Section 2 did not grant the President the power to initiate war.<sup>22</sup> Ratification of the Constitution was conditioned on the belief that under the provisions of the document, the President would not be vested with massive war-powers which could be used arbitrarily and without check.<sup>23</sup>

The "check" upon the Executive war power is embodied in Article 1 Section 8, which gives Congress the power "to declare war."<sup>24</sup> The records of the Constitutional Convention indicate that the original draft of the Constitution gave Congress the power to "make" war.<sup>25</sup> Several delegates expressed the fear that this terminology might lend itself to an interpretation that the President could initiate a war. To avoid any possibility of such an interpretation the word "declare" was substituted

18. *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.); *accord*, *Cook v. United States*, 288 U.S. 102 (1933).

19. 1 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 451 (R. Basler ed. 1953).

20. J. MADISON, *DEBATES ON THE FEDERAL CONSTITUTION* 439 (J. Elliot ed. 1845).

21. *Id.* (remarks of Mr. Sherman).

22. See Wilson, *State House Speech*, in A. MASON, *FREE GOVERNMENT IN THE MAKING* 265 (3d ed. 1965); 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 89-90 (2d ed. 1851).

23. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 180 (4th ed. 1964); 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787*, at 316 (1911).

24. 7 *WORKS OF HAMILTON* 746 (J. Hamilton ed. 1851); 15 *PAPERS OF JEFFERSON* 397 (Boyd ed. 1955); *THE FEDERALIST* No. 69 (A. Hamilton).

25. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 313 (rev. ed. 1937).

for "make."<sup>26</sup> "In other words," stated Alexander Hamilton, "it belongs to Congress only to go to war."<sup>27</sup> This position gains further support from the *Federalist Papers*,<sup>28</sup> which are normally given great weight in determining the true purpose of Constitutional provisions.<sup>29</sup>

The effect of giving the war-declaring power to Congress is to deny the exercise of this power by any other branch of the government.<sup>30</sup> Thus, under the intent of the framers of the Constitution, the President may not initiate a war.<sup>31</sup>

## 2. EFFECT OF HISTORICAL PRECEDENTS

As Justice Frankfurter pointed out in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>32</sup> "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them." Arguments have been advanced that Presidential action or inaction which would normally be unconstitutional may be justified by showing a consistent pattern of similar unchallenged behavior by previous presidents.<sup>33</sup> Proponents of this position suggest the "the precedents by which executive action is to be judged are chiefly historical or political, not judicial, precedents."<sup>34</sup>

If this rationale is correct, it would probably justify the President's action in Vietnam even if it is determined that he initiated a war without prior Congressional approval. A Senate document reports that since 1789 there have been at least 125 incidents in which our armed forces have been ordered to take action abroad without a declaration of war.<sup>35</sup> And, more significantly, "four of our nine serious extended engagements with force against another nation were conducted without Congress 'declaring war' at all."<sup>36</sup>

The Korean conflict is the most recent example of a massive em-

26. *Id.* at 318-19.

27. A. HAMILTON, No. 1 of "*Lucius Crassus*" in ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION 526 (R. Morris ed. 1957).

28. See THE FEDERALIST PAPERS No. 41, at 256 (C. Rossiter ed. 1961) (J. Madison).

29. *Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878).

30. *Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 666, 674-75 (1873).

31. The framers did recognize an exception to this principle:

But when a foreign nation declares or openly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary.

7 WORKS OF HAMILTON 746 (J. HAMILTON ed. 1851). No open or declared war exists, however, between the United States and North Vietnam or the Viet Cong.

32. 343 U.S. 579, 610 (1952).

33. Rogers, *World Policing and the Constitution*, in 11 AMERICA LOOKS AHEAD 78-79 (1945).

34. Jones, *The President, Congress and Foreign Relations*, 29 CALIF. L. REV. 565, 577 (1941).

35. STAFF OF SENATE COMM. ON FOREIGN RELATIONS AND COMM. ON ARMED SERVICES OF THE SENATE, 82D CONG., 1ST SESS., POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES 2 (Comm. Print 1951).

36. Rogers, *supra* note 33, at 45.

ployment of troops over an extended period of time without a congressional declaration of war. It has been maintained that Korea is a unique situation because the action was taken pursuant to a United Nations recommendation.<sup>37</sup> However, this distinction should not be sufficient to destroy the value of Korea as valid precedent. In a constitutional sense, the United Nations Charter is a part of the "supreme law of the land,"<sup>38</sup> but it is afforded no greater significance than any other treaty to which the United States is a party. Further, under the applicable articles of the Charter,<sup>39</sup> no firm obligation was placed upon the United States to engage in the hostilities in Korea,<sup>40</sup> and no other treaty commitments at that time obligated us to join in the defense of South Korea.<sup>41</sup> In addition, as a practical matter, the decision to go to the aid of South Korea was made in Washington by the President *before* the Security Council issued its recommendation.<sup>42</sup>

With regard to Vietnam itself, beginning in 1954 some precedent has been established by the fact that four Presidents have prescribed military assistance to South Vietnam for the past fifteen years.<sup>43</sup> Thus, it appears that if the Constitution can be interpreted by practice, the President's actions with regard to Vietnam would be justified.

In 1915, the Supreme Court recognized "a wise and quieting rule that in determining the meaning of a statute or the existence of a power, great weight should be given to the usage itself even when the validity of the practice is the subject of investigation."<sup>44</sup> This appears to be a valid and necessary rule if any degree of stability is to be maintained in governmental functions. The Court retreated from this position in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>45</sup> however, when it held that President Truman's seizure of a private enterprise in order to settle a labor dispute could not be justified by the fact that prior

37. Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy Making*, 55 AM. J. INT'L L. 45 (1961).

38. U. S. CONST. art. IV.

39. U. N. CHARTER arts. 45, 48.

40. See G. CLARK and L. SOHN, *WORLD PEACE THROUGH WORLD LAW* (1958), for a discussion of the non-binding effect of Security Council recommendations.

41. OFFICE OF THE LEGAL ADVISOR, DEP'T OF STATE, *THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIETNAM*, 112 CONG. REC. 5504, 5509 (1966).

42. Hoyt, *supra* note 37.

43. See generally STAFF OF SENATE COMM. ON FOREIGN RELATIONS, *BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM*, 90th Cong., 2d Sess. (4th rev. ed. Comm. Print 1968); Address by President Johnson on America's Efforts Toward World Order, *A.B.A.*, Aug. 12, 1964, in 51 DEP'T STATE BULL. 298, 299 (1964). However, much of the assistance during the first ten years of this period was of a very limited nature.

44. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). The Court based its opinion on the premise that:

citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. *Id.* at 472-73.

45. 343 U.S. 579 (1952).

Presidents had acted in a similar manner without Congressional authority.<sup>46</sup>

While the rationale of the prior decision seems more logical and practical, it is doubtful the Supreme Court would reverse the position it took in *Youngstown* if it were faced with the contention that the President's actions in Vietnam are justified by historical precedent. At best, it can be surmised that the Court would be strongly influenced by the fact that similar practices have been acquiesced in by Congress on a number of prior occasions.

### 3. VIOLATION OF TREATY OBLIGATIONS

Article IV of the Constitution gives treaties the status of "supreme law of the land."<sup>47</sup> It should follow, a fortiori, that the Executive may not constitutionally violate any treaty provisions. The pragmatic value of this limitation, however, is doubtful.

The President's broad, plenary power to determine the foreign policy of this country has long been recognized.<sup>48</sup> When the President acts in the foreign relations field, courts have consistently refused to review his actions.<sup>49</sup> Thus, since the case of *Ware v. Hylton*,<sup>50</sup> decided by the Supreme Court in 1796, the courts of this country have uniformly held that it is not for the judiciary to determine whether the President has broken a treaty,<sup>51</sup> or even whether a treaty has been terminated or is still in existence.<sup>52</sup> Since no court will even rule on the possibility of a treaty violation, it would be virtually impossible for a judicial tribunal to find a Presidential act unconstitutional because it violated a treaty obligation.

Even if a court did address itself to the question of whether a Presidential action violated a treaty, the court would be bound by all Executive determinations of fact with regard to our foreign policy.<sup>53</sup> Since the President has determined that an actual "armed attack" has

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46. *Id.* at 588-89, where the court says:

Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution . . . .

47. *Missouri v. Holland*, 252 U.S. 416 (1920).

48. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

49. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

50. 3 U.S. (3 Dall.) 158 (1796).

51. Quoting from *George E. Warren Corp. v. United States*, 94 F.2d 597 (2d Cir. 1938), *cert. denied*, 304 U.S. 572 (1938), the rationale for this position was stated in *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941):

Obviously, it would not do for the courts to declare that an act is a breach of a treaty and results in this or that remedy. The remedy accorded might not content the foreign power or might bring about a conflict between the executive and judicial branches of our own government.

52. *Terlinden v. Ames*, 184 U.S. 270, 285 (1902).

53. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 414, 420 (1839); *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000, 1003 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 816 (1951).



occurred in Vietnam,<sup>54</sup> all subsequent actions could be justified under the doctrine of self-defense.<sup>55</sup> This conclusion demonstrates the futility of alleging a violation of a treaty obligation before a tribunal which is bound to accept without question every finding of fact by the President, as in every case the Executive needs only to make those factual determinations which will justify his action.

It should be noted that the domestic and international consequences of a treaty violation are not synonymous. The judicial reluctance to consider possible treaty violations may be conclusive in a constitutional sense, but it is irrelevant with regard to a possible violation of international law.<sup>56</sup> The President may not defend his actions before an international tribunal by asserting that our domestic courts refuse to recognize any violations of our treaty obligations.<sup>57</sup>

## B. *Joint Congressional-Executive Action*

### 1. FORMAL DECLARATION OF WAR

It is a settled rule of constitutional litigation that where the sole responsibility for decision-making is granted to one branch of the government, it may not surrender that responsibility to a co-ordinate branch.<sup>58</sup> Thus, whatever authority Congress may seek to delegate to the President, it cannot delegate the power to declare war, since under Article 1 Section 8 of the Constitution that power is reserved exclusively to Congress. Were it not for this rule, Congress could, by simple resolution, disregard the intent of the framers of the Constitution and give the President the power to initiate war.<sup>59</sup> Such a significant change in the effect of the Constitution should be made only by Constitutional amendment.

Congress may, however, validly authorize hostilities without a declaration of war.<sup>60</sup> In fact, the use of a formal declaration of war is now the exception rather than the rule.<sup>61</sup>

Since no formal declaration of war has been issued with regard to Vietnam, it must be determined whether Congress has authorized

54. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T STATE BULL. 474 (1966).

55. Every applicable treaty to which the United States is a party recognizes the inherent right of self-defense in the event of an armed attack. This point is discussed more completely at pp. 811-13 *infra*.

56. Dickenson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 488 (1956).

57. The international status of our role in Vietnam is discussed at pp. 000 to 000 *infra*.

58. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

59. See text accompanying notes 19-31 *supra*.

60. SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. No. 797, 90th Cong., 1st Sess. 25 (1967); Prize Cases, 67 U.S. (2 Black) 635 (1863); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 36 (1800).

61. Rogers, *supra* note 33, at 41; F. MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR 4 (1883).

any military activities in Southeast Asia and, if so, whether the President's action in Vietnam complies with this authorization.

## 2. DELEGATION OF CONGRESSIONAL POWER

Under the Constitution, the entire sovereign power of the United States to conduct military and diplomatic relations with foreign nations is delegated to the President and to Congress.<sup>62</sup> Since the sole authority in this area rests in these two branches of the government, many writers have concluded that when the President and Congress act concurrently in a foreign relations area their actions can never be unconstitutional.<sup>63</sup> Justice Jackson, in a concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, concluded that if the President acts pursuant to Congressional authorization his act can be found unconstitutional only if "the Federal Government as an undivided whole lacks power."<sup>64</sup>

Absent a formal declaration of war, the use of a "special resolution of Congress seems proper and has been the usual practice"<sup>65</sup> in congressional authorizations of the use of armed forces in a foreign nation.<sup>66</sup> In *United States v. Curtiss-Wright Export Corp.*,<sup>67</sup> the Supreme Court stated that Congress may, by resolution, grant the President the authority to exercise congressional powers based on his unrestricted judgment.<sup>68</sup> The effect of this opinion "would seem in effect to withdraw virtually all constitutional limitations upon the scope of congressional delegation of power to the President to act in the area of international relations."<sup>69</sup>

It is not safe to conclude, however, that the Supreme Court would uphold a congressional resolution giving the President unrestricted control of the military situation in Vietnam.<sup>70</sup> In the recent decision of *Zemel v. Rusk*,<sup>71</sup> the Court stated that "this does not mean that

62. U. S. CONST. arts. I, II.

63. See Moore, *International Law and the United States Role in Vietnam: A Reply*, 76 YALE L.J. 1051, 1092 (1967).

64. 343 U.S. 579, 635 (1952):

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.

65. Q. WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 309-10 (1922).

66. Cf. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870): "Upon the exercise of these [congressional war] powers no restrictions are imposed."

67. 299 U.S. 304 (1936).

68. *Id.* at 324:

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.

69. Jones, *supra* note 34, at 575; accord, C. CORWIN, *THE PRESIDENT—OFFICE AND POWERS 1787-1957*, at 239 (4th rev. ed. 1957).

70. Cf. *Field v. Clark*, 143 U.S. 649, 694 (1892).

71. 381 U.S. 1 (1965).

simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice."<sup>72</sup> In addition, an unrestricted delegation of power could be construed as a grant of war-initiating authority, and thus invalid.<sup>73</sup>

### 3. THE GULF OF TONKIN RESOLUTION

Proponents of the constitutionality of the war often cite the Gulf of Tonkin Resolution<sup>74</sup> as a congressional authorization for the President's action in Vietnam. The Resolution will not validly support such action, however, unless it has sufficient guidelines for presidential action and was intended to authorize the type of action now being undertaken by the President.

Section two of the Tonkin Resolution purports to grant the President the power to use armed force to protect any member or protocol state of the Southeast Asia Collective Defense Treaty.<sup>75</sup> Vietnam is, of course, one of these protocol states. This broad wording, coupled with the acquiescence of Congress since the adoption of the "resolution,"<sup>76</sup> seems to indicate that Congress intended to authorize the present presidential activities when it passed the Resolution.

When the Resolution is interpreted in the context of the events which led to its introduction, however, its true meaning is not clear. The Resolution was considered five days after an allegedly unprovoked attack upon two American destroyers,<sup>77</sup> and most of the debates centered upon this issue.<sup>78</sup> There is, in fact, considerable doubt that the majority of Congress intended to do anything more than express unity and support for the President in a moment of national crisis.<sup>79</sup> Further, Congressional acceptance of the Resolution was undoubtedly influenced

72. *Id.* at 17.

73. See pp. 795-96 *supra*.

74. 78 Stat. 384 (1964).

75. *Id.* § 2:

The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

76. Congress could have repealed the Resolution if at any time it were opposed to the use of the document to justify Presidential action in Vietnam. See 110 CONG. REC. 18409 (1964) (remarks of Senator Fulbright); *United States v. Midwest Oil Co.*, 236 U.S. 459, 481 (1915):

Its acquiescence was [is] equivalent to consent to continue the practice until the power was [is] revoked by some subsequent action by Congress.

77. R. HULL and J. NOVGOROD, *LAW AND VIETNAM* 176 (1968).

78. See 110 CONG. REC. 18,409-60 (Aug. 6-7, 1964).

79. NATIONAL COMMITMENTS, *supra* note 60, at 20:

The prevailing attitude was not so much that Congress was granting or acknowledging the executive's authority to take certain actions but that it was expressing unity and support for the President in a moment of national crisis. . . .

by the President's message in support, in which he emphasized that "[a]s I have repeatedly made clear, the United States intends no rashness and seeks no wider war."<sup>80</sup>

The Congressional debates prior to the adoption of the Resolution are at best inconclusive. The debates on the Resolution lasted two days (August 6 and 7, 1964). Strangely, the opinions of the Congressmen as to the scope of the Resolution changed abruptly sometime during the night of August 6, with the result that the conclusions to be drawn from the debates on the two separate days are diametrically opposed to one another. During the debates held on August 6, two senators termed the Resolution a "pre-dated declaration of war."<sup>81</sup> Senator Fulbright's remarks clearly indicated that the Resolution gave the President the power to use whatever force was necessary, even to the extent of leading us into war.<sup>82</sup>

On the next day, however, Senator Nelson introduced an amendment to the Resolution which would have limited our participation to "the provision of aid, training assistance and military advice."<sup>83</sup> In the discussion on this amendment Senator Fulbright stated that "it states fairly accurately what the President has said our policy would be . . . I do not believe it is contrary to the joint resolution (Tonkin), but it is an enlargement."<sup>84</sup>

It appears, therefore, that few if any definite conclusions as to the scope of the Resolution can be drawn from the congressional debates surrounding its adoption. In view of this inconclusive legislative history, the Resolution will probably be interpreted on the basis of the apparent meaning on its face.<sup>85</sup>

A meaningful interpretation of the wording of the Resolution may be gained by comparing it with the wording of prior congressional resolutions, some of which were intended to delegate the authority to use force and others which were not so intended. In this regard, the joint resolutions on the Middle East,<sup>86</sup> Formosa,<sup>87</sup> and Cuba<sup>88</sup> are typical and illustrative of general congressional practice.

80. 112 CONG. REC. 18,132 (1964).

81. 110 CONG. REC. 18,430 (Aug. 6, 1964) (remarks of Senator Morse); 110 CONG. REC. 18,469 (Aug. 6, 1964) (remarks of Senator Gruening).

82. The following discourse during the debates is illustrative of the point:

Mr. Cooper: Are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense or with respect to the defense of any other country included in the [S.E.A.T.O.] treaty.

Mr. Fulbright (in response): I think that is correct.

Mr. Cooper: Then looking ahead, if the President decided that it was necessary to use such force as could lead us into war, we could give that authority by this resolution.

Mr. Fulbright: That is the way I would interpret it.

110 CONG. REC. 18,409 (Aug. 6, 1964).

83. 110 CONG. REC. 18,459 (Aug. 7, 1964).

84. *Id.*

85. *Cf. South Puerto Rico Sugar Co. & Trading Corp. v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1964).

86. 71 Stat. 5 (1957).

87. 69 Stat. 7 (1955).

88. 76 Stat. 697 (1962).

The resolutions dealing with the Middle East and Formosa were intended to delegate the power to take military action, while the Cuban resolution was intended solely as a statement of policy.<sup>89</sup> The wording in each of the former two resolutions is similar to that employed in the Tonkin Resolution, while the resolution on Cuba lacks the terminology that the "President shall take whatever steps he deems necessary."<sup>90</sup> In addition, the resolutions dealing with the Middle East, Formosa and Tonkin all contain termination clauses.<sup>91</sup> Because there is no delegation of power in the Cuban resolution, it does not contain a termination clause.<sup>92</sup>

It is reasonable to assume, then, that in adopting the Tonkin Resolution Congress did intend to grant the President the power to employ military force as he "deems necessary." To be a valid delegation of Congressional power, a resolution should contain some guidelines for the exercise of the power.<sup>93</sup> These guidelines need not, however, be "narrowly definite standards by which the President is to be governed."<sup>94</sup>

It is not certain that the Tonkin Resolution lays down even general guidelines for presidential action. Section two states that any action taken under it must be "[c]onsonant with the Constitution of the United States and the Charter of the United Nations and in accordance with [the] obligations [of] the Southeast Asia Collective Defense Treaty. . . ." but these limitations are probably mere reiterations of responsibilities that would be owed even if they were never mentioned, rather than definite restrictions on the exercise of presidential power.

No judicial precedent has been established by which such sweeping delegations of military power can be judged. It is clear only that the court will weigh the practical necessity of wide discretion being granted in an area such as this<sup>95</sup> against the inherent purpose of the applicable

89. See 110 CONG. REC. 18,429 (Aug. 6, 1964) (remarks of Senator Morse).

90. The wording in the Formosa, Middle East and Tonkin Resolutions is very similar: Formosa—"the President of the United States be and he hereby is authorized to employ the Armed Forces of the United States as he deems necessary . . . ."

69 Stat. 7 (1955).

Middle East—"if the President determines the necessity thereof, the United States is prepared to use armed forces . . . ."

71 Stat. 5 (1957).

Tonkin—"the United States is, therefore, prepared as the President determines, to take all necessary steps, including the use of armed force . . . ."

78 Stat. 384 (1964).

The Cuban resolution, on the other hand, never mentions the President and provides only "That the United States is determined . . . ." 76 Stat. 697 (1962).

91. All three resolutions contain the almost identical phrase that "This [joint] resolution shall expire when the President shall determine that the peace and security of the area [is assured] . . . ."

92. 76 Stat. 697 (1962).

93. See text accompanying notes 67-73 *supra*; see also E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 149-50 (1917).

94. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321 (1936).

95. See text accompanying notes 105-112 *supra*.

sections of the Constitution to prevent the President from obtaining complete control of the nation's war power.<sup>96</sup>

#### 4. THE SEATO TREATY

It has been argued that the Southeast Asia Collective Defense Treaty,<sup>97</sup> to which the United States is a signatory<sup>98</sup> and South Vietnam is a protocol state,<sup>99</sup> also provides a constitutional justification for the actions taken by the President in South Vietnam.<sup>100</sup> Essentially, the Treaty provides that in the event of an actual "armed attack" against a member or protocol state, all signatories of the Treaty will "act to meet the common danger in accordance with its constitutional process."<sup>101</sup> The Treaty further provides that if a

territory . . . is threatened in any way other than by armed attack . . . the [SEATO] parties shall consult immediately in order to agree on the measures which should be taken for the common defense.<sup>102</sup>

Advocates of the government position argue that the Treaty, having been ratified by Congress, provides a congressional authorization of presidential action in response to an attack against South Vietnam.

The Senate debates pursuant to the adoption of the treaty indicate that most senators did not consider the SEATO Treaty as binding the United States to any duty to unilaterally intervene in the defense of South Vietnam,<sup>103</sup> and these debates are highly persuasive in determining the congressional intent in adopting the treaty.<sup>104</sup> However, the wording of Article 2 clearly indicates that in the event of an "armed attack," as contrasted to the threat of attack, unilateral action by all parties to the treaty was called for.<sup>105</sup> Thus, if an actual armed attack occurred, the United States' action was probably consonant with the provisions of the Treaty.

If the attack on South Vietnam was by some means other than an "armed attack" the United States had a duty to consult with the other

96. See text accompanying notes 19-31 *supra*.

97. [1955] 6 U.S.T. 81, T.I.A.S. No. 3170.

98. *Id.*

99. *Id.*

100. See OFFICE OF THE LEGAL ADVISOR, *supra* note 41.

101. Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, para. 1, [1955] 6 U.S.T. 81, T.I.A.S. No. 3170 (effective Feb. 19, 1955).

102. *Id.* at art. IV, para. 2.

103. The remarks of Senator George, then Chairman of the Senate Committee on Foreign Relations, are typical:

The treaty does not call for automatic action; it calls for consolidation with other signatories . . . I cannot emphasize too strongly that we have no obligation . . . to take positive measures of any kind. All we are obligated to do is consult together about it.

104. CONG. REC. 1051-52 (1955).

105. Cook v. United States, 288 U.S. 102 (1933).

105. Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, para. 1, [1955] 6 U.S.T. 81, T.I.A.S. No. 3170 (effective Feb. 19, 1955).

SEATO members before taking any action.<sup>106</sup> Consultations were conducted and express approval of the United States position was given by the SEATO Council at its meeting in Canberra, Australia, on June 29, 1966, with the French representatives abstaining and the Pakistani representative reserving.<sup>107</sup> This consultation was not held, however, until after the United States had begun bombing the North, in February, 1965.<sup>108</sup> Thus, the United States breached its duty of prior consultation if our action was taken pursuant to Article 4(2) (threat of attack).

For purposes of testing the constitutionality of the President's action, the fact that an "armed attack" occurred must be accepted as true;<sup>109</sup> therefore, the United States could constitutionally respond to the "attack" without consulting the other SEATO members. Since the President complied with the requirements of the treaty, he was at least impliedly acting pursuant to a congressional mandate (in the form of a treaty).

##### 5. CONGRESSIONAL APPROPRIATIONS—IMPLIED CONSENT

Advocates of the constitutionality of the war point to the many congressional military appropriation bills as at least implying authorization for the President's actions in Vietnam.<sup>110</sup> To be sure, the passage of each bill contains affirmations of congressional support for our Vietnam effort.<sup>111</sup> In sending the 1965 bill to Congress, President Johnson stated:

This is not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam.<sup>112</sup>

The Supreme Court recognized this means of congressional authorization in the *Prize Cases*<sup>113</sup> when Justice Grier found a congressional sanction of President Lincoln's actions "in almost every act passed at the extraordinary session of the Legislature of 1861 . . . ."<sup>114</sup> In addition, Congress has frequently sought to affirm the President's employment of military force by approving appropriation bills to finance the cost of the operation and stating, at the time of passage, that the bill is a reaffirmation of the President's action.<sup>115</sup>

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106. D. & A. LARSON, *VIETNAM AND BEYOND* 17 (1965).

107. Wright, *supra* note 2, at 751.

108. *Id.* at 769.

109. *Cf.* Jones v. United States, 137 U.S. 202, 212 (1890).

110. See 114 CONG. REC. S 11,979 (daily ed. Oct. 3, 1968); Military Appropriation Bill, 81 Stat. 5 (1967); N.Y. Times, March 23, 1966, at 13, col. 1 (city ed.).

111. Remarks of Congressman Ford during the debates on the 1966 appropriation bill: Anyone who votes for this legislation is endorsing the policy currently being executed by the Commander in Chief."

112 CONG. REC. 5818 (1966).

112. 112 CONG. REC. 9,729 (1965).

113. 67 U.S. (2 Black) 635 (1863).

114. *Id.* at 669.

115. E. CORWIN, *supra* note 23, at 223-24.

More recently, however, the Supreme Court has held that where the constitutionality of an executive program is in question, the Court will not infer congressional authorization from funding of the program or failure to specifically repeal it.<sup>116</sup> This appears to be the better rule with regard to Vietnam. At the time the appropriation bills were before Congress, massive numbers of our troops were already engaged in fighting in Vietnam. The practical effect of a failure to enact the appropriation bills, then, would be to cut off the supply of food and ammunition from our men at the front. Such a vote would be political suicide for a Congressman. It is doubtful, therefore, that these appropriation bills should be considered anything more than an opportunity for proponents of the administration's policy to proclaim the united support of the Congress for the President and to tack these proclamations onto legislation which, as a practical matter, could not fail to be passed.<sup>117</sup>

### C. *A Pragmatic Approach*

Alexander Hamilton once wrote that "no constitutional shackles can be wisely imposed upon the so-called war powers."<sup>118</sup> The unique nature of foreign relations demands that our foreign relations "machinery" be kept as flexible as possible.<sup>119</sup>

Any attempt to enforce rigid constitutional standards on the President's use of the military could greatly weaken our military position in Southeast Asia and pose an even more serious threat to the security of our troops in Vietnam than already exists. The President, who is "immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature,"<sup>120</sup> must therefore be given the authority to employ force as he "deems necessary." And yet, unrestricted Presidential control of the military would render Article 1 Section 8 of the Constitution nugatory and, in effect, create the very type of situation the framers of the Constitution feared the most and strove so deliberately to prevent.

The answer cannot lie in a requirement that war be formally declared prior to any large scale employment of troops. The juridical consequences of such a formal declaration are such that today war is hardly, if ever, formally declared.<sup>121</sup> In fact, there has been no formal declaration of war issued since the inception of the United Nations in 1947.

116. *Greene v. McElroy*, 360 U.S. 474, 506-07 (1959).

117. *But see* Moore and Underwood, *supra* note 1.

118. *THE FEDERALIST* No. 23, at 119-20 (G. Smith ed., 1901) (A. Hamilton).

119. *See* C. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 15 (1921).

120. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

121. Note, *Congress, the President, and the Power to Commit Forces to Combat*, *supra* note 1, at 1772-73:

the formal declaration of war in the modern context is often deliberately avoided precisely because of the apparent commitment to total victory and the general hardening of attitudes likely to result.



In the Vietnam situation, the issuance of a formal declaration of war by the United States would make the informal and delicate Paris negotiations more difficult. It would necessitate a formal peace treaty and would substantially restrict the flexibility of all parties seeking to resolve the conflict. And finally, a formal declaration of war could directly involve China and Russia—major Communist allies bound to North Vietnam by mutual defense treaties.<sup>122</sup>

The only practical solution to the problem probably lies in the power of Congress to express its position in joint resolutions. The President must be given the power to use force where he deems it to be necessary, subject to the right of Congress to adopt a policy resolution opposing the President's action. In a situation such as Vietnam, where Congress has failed to adopt such a resolution or even to repeal the Tonkin Resolution,<sup>123</sup> the President's action should be deemed constitutional.

This procedure would establish a flexible, workable war-making "machinery" whereby the President would maintain the power to operate effectively as the functional head of the armed forces, and the will of the people could be expressed through the body most representative of the people—Congress.<sup>124</sup> Congress has frequently used a joint resolution to affirm the President's position. The time has come to use this same tool to dissent from his position.<sup>125</sup>

#### IV. THE LEGALITY OF OUR INVOLVEMENT UNDER INTERNATIONAL LAW

##### A. *The Geneva Accords of 1954*

Active American participation in the Vietnam conflict began in 1954, after the cessation of hostilities pursuant to the Geneva Accords.<sup>126</sup> The Accords placed certain restrictions on the scope of activities which could be carried on in the North and South zones and further limited the activities of the so-called government of each sector.

While the United States was not a party to this document, her

122. DEP'T OF STATE, *THE QUESTION OF A FORMAL DECLARATION OF WAR IN VIETNAM* (1965), cited in STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 90th Cong., 2d Sess., *BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM* 168 (4th rev. ed. Comm. Print 1968); see also Falk, *supra* note 2, at 1154.

123. On March 1, 1966, Senator Morse introduced an amendment to an appropriations bill which sought to repeal the Tonkin Resolution. The amendment was defeated by a vote of 92 to 5. 112 CONG. REC. 15,558 (1966).

124. Use of a joint resolution dissenting from the President's position should not be confused with a refusal of appropriation bills. As discussed previously, practical considerations would normally require approval of such measures regardless of congressional opinion of the President's action.

125. Under no circumstances, however, should Congress delegate the power to formally declare war to the President.

126. Agreement on the Cessation of Hostilities in Viet Nam, July 20, 1954, in U.S. DEP'T OF STATE PUB. NO. 6446, 1 AMERICAN FOREIGN POLICY 1950-1955, BASIC DOCUMENTS 750 (1957).

subsequent involvement in the affairs of Vietnam obligated her to abide by the provisions of the agreement.<sup>127</sup> Thus, the legality of our position in the conflict depends to some extent upon how well we have complied with these provisions.

While factual determinations with regard to Vietnam are often difficult to verify, it is clear that by 1965, if not before, both the United States and North Vietnam had violated numerous provisions of the Accords.<sup>128</sup> Legal responsibility, therefore, must rest upon the country that first violated the agreement.<sup>129</sup>

Initial allegations of a breach of the agreement center around Article 7 of the Final Declaration, which provides that "general elections shall be held in July, 1956,"<sup>130</sup> pursuant to a reunification of the North and South zones under one government. On July 16, 1955, the Diem regime (then ruling South Vietnam), with American backing, announced that it would not participate in the prescribed nation-wide elections and would not negotiate with Hanoi about their modalities.<sup>131</sup> Critics of United States' participation in the war claim that this refusal to hold general elections was the initial breach of the Accords and justified any subsequent breaches by North Vietnam.<sup>132</sup>

It has been contended that when the cease-fire agreement was signed, "there seem to have been only minimal shared expectations on the political settlement,"<sup>133</sup> therefore, the failure of South Vietnam to hold elections would not justify retaliatory military action by the North. It is more likely, however, that the decision not to hold elections was based on political expediency,<sup>134</sup> and was made in spite of the fact that it violated the Accords.<sup>135</sup>

While the refusal to hold elections probably was a breach of the Accords, it does not necessarily follow that this breach justifies all sub-

127. LAWYERS COMMITTEE ON AMERICAN POLICY TOWARD VIETNAM, VIETNAM AND INTERNATIONAL LAW 94 (1967).

128. As of this date, infiltration from the North was firmly established and the United States had begun bombing the North. Both of these actions were contrary to the Geneva Accords. See Wright, *supra* note 2, at 755.

129. Unless the other party reacted in a disproportionate manner, as may well have been the case.

130. *Supra* note 126, at art. 7.

131. Standard, *United States Intervention in Vietnam is Not Legal*, 52 A.B.A.J. 627, 631 (1966); VIETNAM: HISTORY, DOCUMENTS, AND OPINION ON A MAJOR WORLD CRISIS 160-74 (H. Gettleman ed. 1965).

132. The United States has accepted the proposition that a material breach by one party to an agreement entitles the other party to withhold its compliance with the agreement "until the defaulting party is prepared to honor its obligations." OFFICE OF THE LEGAL ADVISOR, *supra* note 41, at 4434. Of course, the United States claims that North Vietnam first violated the Accords. *Id.*

133. Moore, *supra* note 4, at 1064.

134. President Eisenhower has given the reason for the failure of the United States to allow a general election in 1956:

persons knowledgeable in Indo-Chinese affairs (believed that) possibly 80 per cent of the population would have voted for the Communist Ho Chi Minh.

D. EISENHOWER, WHITE HOUSE YEARS: MANDATE FOR CHANGE, 1953-1956 372 (1963).

135. Wright, *supra* note 2, at 761.

sequent military action by North Vietnam. Under international law, a breach of an agreement entitles the aggrieved party to respond only in a manner proportionate to the scope and severity of the infraction by the breaching party.<sup>136</sup> North Vietnam responded to the South's refusal to conduct general elections by renewing active hostilities.<sup>137</sup> It is unlikely that this response could be held proportionate to the initial breach of the cease-fire agreement.

With the renewal of hostilities, it became apparent that neither side considered itself bound by the Accords or even attempted to abide by them. Massive troop and armament infiltration from the North was countered by a buildup of American troops and armaments in the South, and finally with the actual bombing by American aircraft of military targets in North Vietnam.<sup>138</sup>

It is nearly impossible to make a valid factual determination as to the extent or chronological order of violations of the Accords by both sides following the failure to have nation-wide elections in 1956. Even if such determinations could be made, it is not likely that an international tribunal would give effect to the Accords, in view of the fact that both sides acted as if they did not exist. It appears, therefore, that if the United States is violating international law by its participation in Vietnam, this violation must be based on some document or legal principle other than the Geneva Accords.

### B. *The United Nations Charter*

#### 1. "CIVIL STRIFE" OR INTERNATIONAL CONFLICT

The Charter of the United Nations recognizes the principle of "self-determination of peoples."<sup>139</sup> Included in the right of self-determination is the right to conduct a rebellion in order to oust an unpopular government.<sup>140</sup> It follows, a fortiori, that when a government is in danger of being toppled by insurgents, neither party is competent to request foreign intervention.<sup>141</sup> Thus, if the Vietnam conflict is a civil strife, indigenous to that country alone, the United States cannot legally participate in the conflict.

It is not clear that the insurrection led by Ho Chi Minh against the French was ever a civil strife.<sup>142</sup> However, even if it was, with the with the adoption of the Geneva Accords and the partition of the coun-

136. I. DETTER, *TREATIES* 91 (1967).

137. Wright, *supra* note 2, at 761.

138. OFFICE OF THE LEGAL ADVISOR, *supra* note 41.

139. U.N. CHARTER art. 1, para. 2.

140. Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 121 (1959).

141. W. HALL, *A TREATISE ON INTERNATIONAL LAW* 347 (8th ed. 1924).

142. Compare Wright, *supra* note 2, at 756-58, with Address by W. Sebold, *Collective Security on the Search for Peace*, Univ. of Wyo. Feb. 12, 1955, in 32 DEP'T. STATE BULL. 375, 378 (1955).

try into two zones the conflict took on a new dimension and became, in effect, an international war. Sir H. Lauterpacht points out that a conflict which was at its inception a civil strife "may become war through the recognition of the contending parties, or of the insurgents as a belligerent power. Through such recognition, a body of individuals receives an international position. . . ." <sup>143</sup>

A strong argument can be made for the proposition that since 1954 both North and South Vietnam have achieved at least de facto status as independent states.<sup>144</sup> Since that time South Vietnam has been recognized as a sovereign nation by about sixty nations and has de jure diplomatic relations with about fifty-two of them.<sup>145</sup> Further, North Vietnam is similarly recognized by about twenty-four nations.<sup>146</sup>

The de jure status of South Vietnam has been noted by the United Nations General Assembly, which has expressed the opinion that the Republic of Vietnam (South Vietnam) is fully qualified for United Nations membership.<sup>147</sup> Membership has not been granted only because each time South Vietnam has sought to become a member, the Soviet Union has vetoed the resolution in the Security Council.<sup>148</sup>

Dissenters from the government position point out that when the sharp increase in the American military effort began in early 1965, it was estimated that only 400 North Vietnamese soldiers were among the enemy forces in the South, which totalled 140,000 at that time.<sup>149</sup> This fact, they claim, substantiates the position that until the United States escalated the war, the conflict involved only the government of South Vietnam and an indigenous guerilla movement—the Vietcong. If this were true, the conflict would have been a civil strife in spite of the fact that North and South Vietnam were separate political entities.

However, in 1962, the International Control Commission,<sup>150</sup> created to police the demilitarized zone between North and South Vietnam, reported that men and munitions were being infiltrated from North

143. 2 L. OPPENHEIM, *INTERNATIONAL LAW* 209 (7th ed. H. Lauterpacht 1948).

144. Freidmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT'L L. 857, 866 (1965); *But see* statement of Secretary of State Rusk that the war is an "effort by a Communist regime in one-half of a divided country to take over the people of the other half . . . . Testimony by Sec. D. Rusk and Gen. M. Taylor on The U.S. Commitment in Vietnam: Fundamental Issues, *Senate Comm. on Foreign Relations*, Feb. 18, 1966, in 54 DEP'T STATE BULL. 346, 352 (1966).

145. OFFICE OF LEGAL ADVISOR, *supra* note 41, at 5521.

146. Moore, *supra* note 4, at 1056.

147. 12 U.N. GAOR, Annexes, Agenda Item No. 25, at 2-4, U.N. Doc. A/3712 (1957); 11 U.N. GAOR, Annexes, Agenda Item No. 25, at 9, U.N. Doc. A/Res. 523 (1957).

148. 13 U.N. SCOR 843d meeting 8-10, (1958); 12 U.N. SCOR, 790th meeting 5, (1957).

149. *Report of Senator Mansfield, Senate Committee on Foreign Relations*, 112 Cong. Rec. 140,141 (1966).

150. The International Control Commission is an impartial fact-finding body composed of delegates from Canada, India and Poland. The Commission reports any violations of the Geneva Accords.

Vietnam to the South.<sup>151</sup> While the conflict involved mainly various factions in the South, the insurgents were being actively supported by North Vietnam, thus removing the conflict from the "civil strife" category.<sup>152</sup>

Perhaps the strongest argument against categorizing the conflict as an internal affair is the precedent which would be established for similar situations. Both Korea and Germany were partitioned by agreements that on their face, contemplated reunification. To argue that North Vietnam has a right to forcefully reunify Vietnam is to license a unification of Germany and Korea by force.<sup>153</sup> A rule of international law so unsettling and conducive to violence should have no place in today's already restless world.

## 2. DUTY TO REFRAIN FROM THE USE OF FORCE

Article 2(4) of the United Nations Charter requires that members shall refrain from "the threat or use of force" in a manner "inconsistent with the purposes of the United Nations." As a member of the United Nations, the United States is obligated to pursue every avenue to a peaceful solution of its international conflicts before resorting to the use of force. Article 2(6) of the Charter indicates that this obligation is present even when dealing with non-member states such as North and South Vietnam.<sup>154</sup>

An exception to this prohibition of the use of force is found in Articles 51 and 52 of the Charter. Article 51 provides that force may be used to repel an "armed attack,"<sup>155</sup> and Article 52 provides for the establishment of regional defense agreements.<sup>156</sup> The effect of such regional agreements is to make an armed attack on any party to the agreement justify a self-defensive use of force by any other party to the agreement as well as by the country that was actually attacked.<sup>157</sup>

Under Article 51, the right to use force in self-defense is limited

151. Dep't of State, *Department Statement*, 47 DEP'T STATE BULL. 109 (1962).

152. Stevenson, *U.S. Submits Report on Vietnam to U.N. Security Council*, 52 DEP'T STATE BULL. 419 (1965).

153. E. ROSTOW, *LAW, POWER AND THE PURSUIT OF PEACE* 65 (1968).

154. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 119 (7th ed. H. Lauterpacht 1952).

155. U.N. CHARTER art. 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . . .

156. U.N. CHARTER art. 52:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

157. L. OPPENHEIM, *supra* note 143, at 156.

to those instances when an actual "armed attack" has occurred.<sup>158</sup> It is not necessary to the finding of an "armed attack," however, that an overt invasion be involved<sup>159</sup> or that the attack be waged directly by the principal aggressor.<sup>160</sup> It is also not essential that the attack be made against a territory or sovereign member of the United Nations.<sup>161</sup> The United Nations action in Korea further established the precedent that aggression against one zone of a divided state by forces of the other zone invokes the right of self-defense under Article 51.<sup>162</sup>

Any right to use force against North Vietnam that the United States may possess is derived from the Southeast Asia Collective Defense Treaty,<sup>163</sup> of which South Vietnam is a protocol state.<sup>164</sup> The first U.S. action against the North occurred in February 1965, when the policy of bombing military installations in the North was first implemented.<sup>165</sup> This action can be justified, therefore, only if it is found that an "armed attack" was launched against South Vietnam before that time and that the bombing was a proportionate response to the attack.<sup>166</sup>

While the factual determination of an armed attack is often difficult to make, it appears that such an armed attack had been launched against South Vietnam before February 1965. In 1962 the International Control Commission reported that the infiltration of men and arms into the South had "the objective of supporting, organizing and carrying out hostile activities, including *armed attacks*, directed against the . . . South."<sup>167</sup> While the claims of the belligerents as to the existence of attacks may be discarded as being largely self-motivated, this Commission operated as an impartial fact-finding body under the Geneva Accords and its observations are probably as reliable as any which are available.

The question of proportionality of response is more difficult. In spite of U.S. claims of careful restraint in the use of airpower against the North,<sup>168</sup> the tonnage of bombs dropped has been enormous.<sup>169</sup> While the factual question of whether it was necessary to use this much force is difficult to answer, it would appear that it is not grossly out of proportion with the threat involved, especially since infiltration from the North continues daily in spite of the bombing.

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158. A. Kelsen, *LAW OF THE UNITED NATIONS* 269 (1950); J. Stone, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 244 (1954).

159. Kelsen, *Collective Security Under International Law*, 49 INT'L L. STUDIES 88 (1956).

160. I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 373 (1963).

161. L. OPPENHEIM, *supra* note 143, at 155.

162. Wright, *supra* note 2, at 751.

163. [1955] 6 U.S.T. 81, T.I.A.S. No. 3170.

164. *Id.*

165. OFFICE OF THE LEGAL ADVISOR, *supra* note 41, at 5505.

166. Parton, *Legal Aspects of the Vietnam Conflict*, 46 B.U.L. REV. 281, 308 (1966).

167. OFFICE OF THE LEGAL ADVISOR, *supra* note 41, at 5504 (emphasis added).

168. See Address by President Johnson on The Defense of Vietnam: Key to the Future of Free Asia, *Joint Sess. of the Tenn. State Legislature*, March 15, 1967, in 56 DEP'T STATE BULL. 534, 536 (1967); Address by U. Johnson on Viet-Nam Today, *Research Inst. of Japan*, Sept. 16, 1965, in 53 DEP'T STATE BULL. 626, 632 (1965).

169. Velvel, *supra* note 14, at 454.

Articles 51 and 52 also require that any nation resorting to force in self-defense report the incident to the Security Council as soon as possible.<sup>170</sup> The United States has complied with this requirement and has, in fact, undertaken a continuing duty to keep the Security Council informed as to new developments in the conflict.<sup>171</sup> After continued insistence by the United States, the Security Council finally voted on February 2, 1966, to place the Vietnam question on its agenda.<sup>172</sup> This was, however, as much as has been accomplished, and no action has ever been taken by the Security Council to restore peace in Vietnam.<sup>173</sup> The United States has acknowledged the "authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary in order to . . . restore international peace and security by action in Vietnam."<sup>174</sup> But, as a practical matter, as long as the veto power exists in the Security Council it is doubtful that action will be taken in favor of either side in the conflict.<sup>175</sup> Failure of the Security Council to act should not be taken as tacit approval of United States involvement in Vietnam,<sup>176</sup> however.

Once the notification requirement of Article 51 has been satisfied, the use of force in self-defense is "permitted only for so long as the Security Council has not taken the necessary steps to maintain or restore international peace and security."<sup>177</sup> Theoretically, this means that the United States may continue bombing the North until either the Security Council acts on the matter or the infiltration from the North ceases.<sup>178</sup>

### C. *A Pragmatic Approach*

The United States appears to be in the embarrassing position, with regard to Vietnam, of having acted first without regard to international law and now, due to the unpopularity of the war, being forced to look to international law to justify its position. This practice of molding the law to fit an individual situation is particularly bad when the country involved is a world leader such as the United States, because:

when the United States acts unilaterally in defiance of international law, it does not buy time. It sets the clock back. After

170. The text of these articles may be found in notes 142 and 143 *supra*.

171. See *United States Letter to the President of the U.N. Security Council*, 52 DEP'T STATE BULL. 240, 241 (Feb. 7, 1965); *Report to the U.N. Security Council*, 51 DEP'T STATE BULL. 272, 274 (1964).

172. *Question Inscribed on Council's Agenda*, 3 U.N. MONTHLY CHRONICLE 3 (March, 1966).

173. *Id.*

174. *Hearings on S. Con. Res. 44 Before the Senate Comm. on Foreign Relations on the Submission of the Vietnamese Conflict to the United Nations*, 90th Cong., 1st Sess. 192-97 (1967).

175. See generally Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 515 (1956).

176. Wright, *supra* note 2, at 751.

177. L. OPPENHEIM, *supra* note 143, at 156.

178. In such a case the "armed attack" will have ended, and any continued bombing would definitely be a disproportionate use of force and therefore unjustified.

the crisis has passed, it cannot expect again to take up its rhetorical commitment to world order, as if nothing had happened. As the most powerful nation in the world, the United States creates standards of conduct by its own acts.<sup>179</sup>

This situation is the result of the universal practice of placing political expediency above international law.<sup>180</sup> But so long as the United Nations fails to provide an effective means of policing infractions of international law, the practice will undoubtedly continue.<sup>181</sup>

The cry for a stronger United Nations, and specifically a Security Council that cannot be stymied by a single veto, has been issued many times.<sup>182</sup> Perhaps the tragedy of Vietnam will provide the impetus needed to bring about these changes. The chance of such a sweeping change being made is poor indeed, but without this modification of the present world organization the prospects for the future are dim.

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179. Barnet, *The American Responsibility*, VIETNAM READER 45, 49 (M. Raskin and B. Fall eds. 1965), quoted in Robertson, *The Debate Among American International Lawyers About the Vietnam War*, 46 TEX. L. REV. 898, 905 (1968).

180. See generally Wright, *supra* note 2, at 754.

181. See generally G. CLARK and L. SOHN, *supra* note 40.

182. *Id.* at 81.